In the High Court of Judicature at Madras

Dated : 21.7.2007

Coram :

The Honourable Mr.Justice K.RAVIRAJA PANDIAN
and
The Honourable Mr.Justice P.P.S.JANARTHANA RAJA

C.M.A. No.1541 of 2007

The Commissioner of Customs (Exports)
Custom House
Chennai 1 .. Appellant

Vs

1. M/s. Jraj Exports (P) Ltd.,
50-A B.S.S.Nagar
Tiruppur 641 602.

2. The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench
Shastri Bhawan Annexe
1 Floor, 26, Hadddows Road
Chennai 6. .. Respondents

Civil Miscellaneous Appeal filed u/s 130 of the Customs Act 1962 against the Final Order No.445 of 2006 dated 26.5.2006 on the file of the Customs, Excise And Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.K.Ravichandrabaabu
Senior Central Govt. Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by K.RAVIRAJA PANDIAN,J)

The above appeal is filed under Section 130 of the Customs Act 1962, against the Final Order No. 445 of 2006 dated 26.5.2006 made by the Customs, Excise And Service Tax Appellate Tribunal, South Zonal Bench, Chennai. The question of law formulated for entertainment of the appeal is as follows.

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"Whether it is correct in Law for the learned CESTAT to hold that Bank Guarantee is a security in lieu of duty even after enforcing the same and appropriated towards the duty by the Department ?"

2. The first respondent in this appeal had imported capital goods under EPCG Licence No.2142049 dated 1.7.1998 with the condition to fulfill the export obligation imposed against the above EPCG licence within the prescribed time limit. The first respondent failed to submit the Export Obligation Discharge Certificate from the appropriate authority, even after the expiry of the prescribed time. Hence, the appellant had invoked the Bank guarantee furnished for the proper performance of the condition attached to the EPCG licence in a sum of Rs.5,54,046/- and the amount was realised by the appellant. Subsequently, the respondent filed the refund application on 29.11.2004 for refund of the amount so realised by invocation of the bank guarantee on the ground that the Export Obligation was fulfilled by the first respondent. To that effect, the first respondent also submitted the Discharge Certificate from the licensing authorities. That request for refund of the amount has been rejected by the Deputy Commissioner of Customs (Refund) on the ground that as per the provisions of Section 27(1)(b) of the Customs Act a person claiming refund of any duty or interest if any paid on such duty would make an application for refund of such duty and interest paid on such duty to the Assistant Commissioner or Deputy Commissioner before the expiry of six months from the date of payment of such duty. In the case on hand, the amount was realised on 27.3.2004. The refund application was received on 29.11.2004. Hence the refund could not be made. The first respondent filed an appeal before the Commissioner of Customs (Appeals), who by his order dated 7.10.2005 in C.Cus.646/2005 allowed the appeal. The Department carried the matter on further appeal to the Customs, Excise, Service Tax Appellate Tribunal. The appeal was dismissed by its order dated 26.5.2006. The correctness of the said order is now canvassed before this Court.

3. We heard the arguments of the learned counsel for the appellant.

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4. From the facts narrated above, it is a case where the appellant's request for refund of the bank guarantee wrongly encashed was rejected on the ground that the claim is time barred. The case of the appellant has to be rejected on two grounds, firstly on facts. It is evident from the records that the bank guarantee was invoked and the

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amount was credited to the Customs Treasury on 1.4.2004. The first respondent produced the Export Obligation discharge certificate obtained from the Director General of Foreign Trade on 16.4.2004, based on which the appellant duly cancelled the bond and the Bank guarantee during the month of August 2004. When the department accepted the fulfillment of export obligation and the export obligation discharge certificate issued by the Director General of Foreign Trade, there is no need either to invoke the bank guarantee or retain the amount, which has already been credited in the department account on invocation of the bank guarantee and the technical plea that the refund of the amount cannot be granted as the claim made is barred by limitation under Section 27(1)(b) of the Customs Act also cannot be legally sustainable. The furnishing of bank guarantee in order to fulfill the export obligation cannot be regarded as "payment of duty " which the first respondent is liable to pay. The Supreme Court in the case of OSWAL AGRO MILLS LTD., AND ANOTHER VS. ASSTT. COLLECTOR OF CENTRAL EXCISE (1994 (2) SCC 546) held that furnishing of bank guarantee pursuant to an order of the court is not equivalent to payment of excise duty. For the purposes of securing the revenue in the event of revenue succeeding in the proceedings before a Court, the Court as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is security for the revenue that in the event the revenue succeeds its dues will be recoverable being backed by the guarantee of a bank. The amount of the disputed tax or duty that is secured by a bank guarantee cannot therefore, be held to be paid to the revenue. Thus, as per the Supreme Court Judgment , the bank guarantee given for due performance of the export obligation cannot be regarded that the first respondent paid the amount which they would have paid in the circumstances of non-performance of the export obligation. Hence the reason stated that the demand was made beyond the period prescribed under Section 27(1)(b) of the Customs Act has to be rejected.

5. Learned counsel for the appellant relied on the often quoted judgment in MAFATLAL INDUSTRIES LTD., AND OTHERS VS. UNION OF INDIA AND OTHERS(1997 (5) SCC 536) in order to contend that the refund should be ordered only in accordance with the provisions of the statute. Here again, there is a fallacy in the argument of the counsel for the appellant in the sense that the Supreme Court in that case has formulated only the procedure to be followed while applying for refund of the tax already paid and making the order for refund of the amount paid . Even paragraph 115 of the judgment and the above said provisions of the Act with which reliance has been made by the learned counsel for the appellant is not furthering the case of the appellant. As already said

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the entire case in that case was concentrated about the procedure to be followed, while making the refund of tax or duty already paid . In this case, we have already come to the conclusion that the bank guarantee furnished cannot be considered as duty paid and it is only security to safeguard the interest of the revenue.

6. For the above said reasoning, we are of the view that the appellant has not made out any case for admission and the appeal is dismissed. No costs.

Krr/

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To
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Chennai 1

2. The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench
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Chennai 6.

+ One cc to Mr. K. Ravichanandrabaabu, SCCG SR 44664
JRG (co)
sg 18/8/07

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